STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing No. 16,223
	)	
Appeal of	)	

INTRODUCTION

The petitioner appeals a decision of the Department of Social Welfare denying her an exception for Medicaid coverage of acupuncture and massage therapy to treat fibromyalgia.

FINDINGS OF FACT

1. The petitioner is a fifty-two-year-old Medicaid recipient who has been diagnosed with fibromyalgia, a condition which causes her to feel generalized pain throughout the muscles of her body. She has undergone a number of different therapies to alleviate her pain including medications, biofeedback, physical therapy and water aerobics. She has received little relief from these therapies and the medication, particularly, has been expensive, although it has been covered by Medicaid.

2. The petitioner has most recently been treated with acupuncture and massage therapy. She is convinced that these therapies alleviate her pain and she wishes to pursue them. She feels that massage therapy relieves her for a day while

acupuncture relieves her pain for several days. Because Medicaid does not allow payment for these therapies she has paid for them herself but can no longer do so. Her conventional therapies cost three times more than her alternative treatment but those costs are paid by Medicaid. Because she feels she can be helped by these alternative therapies and they will cost less, the petitioner requested an exception to allow coverage of these therapies under a relatively new procedure adopted by the Department.

3. In her application, which was filed last October, the petitioner described her pain, loss of range of motion and inability to sleep due to fibromylagia. She described how two courses of acupuncture gave her relief from pain and how massage therapy has also helped her to feel better. She was supported in her claim by a nurse practitioner who has been treating her and who offered the following opinion:

> [Petitioner] has been suffering with fibromyalgia since 1991 and prior to that received injuries R/T accident, where she sustained chest trauma in 1989. [Petitioner] has chronic pain which hinders her sleep pattern. This patient has tried various medications for her sleep difficulties and pain. Currently she is on Sinaquin 150mg QHS with minimal effectiveness.

When asked to describe extenuating circumstances that could be reasonably expected to produce serious detrimental

health consequences if the petitioner was not provided these therapies, her nurse responded as follows:

> In the case of acupuncture – I do not see any serious consequences. If it helps this patient I find it a better route than medications that may be addicting. In the case of massage therapy – the patient needs to keep her mobility in her joints. The massage will help improve circulation and mobility. This will help with the patient's pain and sleep.
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> She added:
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> These are alternative therapies with not a lot of studies to support them. However, there is a lot of literature on the positive effects of alternative therapies.

4. On November 15, 1999, the Department denied the request after a review by the medical director and staff. Attached to the denial was a three page explanation of the Department's decision based on the ten criteria in the regulation. (Attached hereto as Exhibit No. Three.) To summarize, the Department determined that the petitioner had not shown that she has unique extenuating circumstances which will lead to serious detrimental health consequences if massage therapy and acupuncture are not provided to her; that these therapies are not generally offered to Medicaid recipients because their efficacy has not been proven; that the goal of the Medicaid program is to cover services that have proven to be efficacious; that there was a rational basis to exclude coverage because the therapies were not proven to

be efficacious; that the services are experimental or investigational; that the medical appropriateness and efficacy of the requested services remain in question due to a lack of clinical studies that have proven neither to be medically efficacious; that the petitioner has alternative therapies covered by Medicaid, namely, physical therapy, pharmacological treatment and treatment at a pain clinic; and that the requested treatments are useful to people in the absence of illness, injury and disability, and that their medical use has not been proven. The Department concluded:

> The documentation submitted with this request for acupuncture and massage therapy presents no unique and medically compelling need under the ten criteria set forth above, as required by Vermont Medicaid Policy M108. These criteria, considered in combination, do not present grounds to approve acupuncture and massage therapy for [petitioner]. Therefore, authorization and coverage for acupuncture and massage therapy is denied. Acupuncture and massage therapy will not be added to a list that has been pre-approved for coverage at this time.

5. The Department relied on a November 1997 consensus statement by the National Institutes of Health for its position that acupuncture has not yet been proven effective. This report consists of a review of the literature and studies on acupuncture by a multi-disciplinary panel of medical experts. The panel concluded:

> Acupuncture as therapeutic intervention is widely practiced in the United States. While there have been

> many studies of its potential usefulness, many of these studies provide equivocal results because of design, sample size, and other factors. The issue is further complicated by inherent difficulties in the use of appropriate controls, such as placebos and sham acupuncture groups. However, promising results have emerged, for example, showing efficacy of acupuncture in adult postoperative and chemotherapy nausea and vomiting and in postoperative dental pain. There are other situations such as addiction, stroke rehabilitation, headache, menstrual cramps, tennis elbow, fibromyalgia, myofascial pain, osteoarthritis, low back pain, carpal tunnel syndrome, and asthma, in which acupuncture may be useful as an adjunct treatment or an acceptable alternative or be included in a comprehensive management program. Further research is likely to uncover additional areas where acupuncture interventions will be useful.
>
> NIH Consensus Statement
> Vol. 15, No.5, p.2

The report went on to identify issues that still needed to be addressed in order to incorporate acupuncture into the United States health system including training and credentialing of practitioners, safeguards against adverse effects, and coordination with medical health care providers and insurers. Id, p 13-15.

6. In rebuttal, the petitioner offered the following:

   A. A book on fibromyalgia and muscle pain by an English naturopath and osteopath which contains a bibliography of studies done, many in Great Britain, on acupuncture and pain. That author concluded that acupuncture in general and electroacupuncture in particular have been useful in treating pain although it seems to require frequent treatment over months or even years. He also concluded that massage therapy has been useful in treatment of fibromyalgia

according to a Florida study in 1994 which found that massage relieved pain, fatigue, stiffness, and improved the quality of sleep.

B. A note from her massage therapist dated January 1990 saying that deep muscle massage relieves general tension and spasticity. The bill for this therapy was paid by the petitioner's Worker's Compensation insurance.

C. An abstract of a study conducted at the University of Maryland School of Medicine in 1999 which stated that the strongest data exist for the use of mind-body techniques (biofeedback, hypnosis, cognitive behavioral therapy) as part of a multidisciplinary approach to treatment of fibormyalgia, that less strong data exists for the efficacy of acupuncture which was also found to exacerbate symptoms in some patients and that the weakest data exists for manipulative techniques such as chiropractic and massage. The conclusion was that further research was needed.

D. An abstract of a 1987 study by the Finnish NHS of a five-year trial showing that chronic pain syndromes could be successfully treated in a large number of cases through acupuncture sessions, particularly in areas affecting the head, neck, shoulder and arm.

E. An abstract of a 1991 Russian study showing that post-traumatic pain was best treated by an "IRT" method and that electroanalgesic methods were more satisfactory than acupuncture.

F. A survey of acupuncture users conducted by the Traditional Acupuncture Institute in 1998 showing that 77.7% of acupuncture users felt their symptoms were relieved by that procedure, even when they were using a number of other therapies. They also reported that its use was cheaper than traditional modalities such as medication.

G. Information from a private health insurer in California showing that it covers massage therapy for myofascial release and acupuncture for fibromyalgia.

7. The above were supplied to and reviewed by the Medicaid medical director who responded as follows:

. . .

> The material provided does not shed any additional information that would enhance the need for the original request. Acupuncture is evolving as a clinical intervention but has not been sufficiently demonstrated to have clear cut efficacy. It can be argued that there are some clinical entities that suggest benefit, such as fibromylagia. But the clinical reporting has not reached a sufficient level that would indicate reasonably board acceptance that would enable acupuncture to [be] made a part of a broad benefits package. The NIH Consensus statement is very important to DSW as well as other payers of health care in that it is a forum to critically discuss the known world literature on acupuncture and other treatments. Information from sources such as the NIH [are] important in the decision making process for the reasons previously stated.

Citing the last half of the NIH conclusion set out above in paragraph 5, he concluded:

. . .

> The key to this statement is the use of acupuncture as an adjunct in a management program <u>may be useful.</u> It is not definitive. There is still no documentation from other care providers such as the patient's primary care physician or documentation from a pain management clinic, that might shed some light on the extent of the pain or the clinical steps followed to treat it. Fibromyalgia may be uncomfortable but is not life threatening. The degree of discomfort reported by the patient underscores the need for her to be part of a comprehensive management

program as opposed to being followed by an acupuncturist who may have significant limitations.

I, therefore, continue to recommend that this request not be approved.

8. The petitioner responded to this by arguing that she has had three separate physical traditional programs of manipulation therapy, two programs of bio-feedback pain management, two massage therapy programs, two acupuncture courses of treatment and several evaluations of her condition, including a pain evaluation and surgery to her chest. She argued that the use of acupuncture and massage is efficient therapy for her.

ORDER

The decision of the Department is affirmed.

REASONS

The Medicaid regulations specifically exclude coverage of acupuncture for treatment of any condition:

M613.1 Acupuncture

> Although acupuncture has been used for thousands of years in other parts of the world, it is a new technique in this country. Three units of the National Institutes of Health have been designated to assess the use of acupuncture for anesthesia and relief of chronic pain. Until that assessment has been completed and its efficacy has been established, no payment will be made for acupuncture.

Massage therapy is not included in the listing of inpatient and outpatient hospital services or physician services covered by Medicaid. In general, Medicaid will pay for the services of licensed medical personnel such as physicians, chiropractors, nurse practitioners, dentists audiologists, opthamologists and rehabilitation therapists working under the supervision of a physician. See e.g. M600, 640, 510(10). No services are reimbursed to persons who are not strictly medical in nature.

The petitioner does not challenge the validity of these regulations[1] with regard to everyone. Rather she has asked for an evaluation of her own situation pursuant to M108, a regulation adopted on April 1, 1999 which allows the Department to review individual situations pursuant to a set of criteria. A copy of the regulation is attached hereto as Exhibit No. One and incorporated herein.

This is a case of first impression before the Board. The attached regulation does not guarantee any benefit to any particular applicant. What it does guarantee is a right to have the case individually reviewed and gives the Commissioner

[1] The Board determined in Fair Hearing No. 15,645 that the Department's decision not to cover acupuncture for Medicaid recipients was a policy decision as it is not required by the federal Medicaid regulations. Fair Hearing No. 15,645.

the authority to make exceptions in cases which she deems meet the criteria. The regulation vests a good deal of discretion in the Commissioner although that discretion is tied to reviewing certain criteria. When the Commissioner has the discretion to make a decision, the Board may only overturn it if it is arbitrary, unreasonable or demonstrates an abuse of discretion. The Board may not overturn a decision simply because it would have reached a different decision. 3 V.S.A. § 3091(d) and Fair Hearing Rule No. 17.

In this case, the Commissioner asked the medical director and his staff to review the evidence provided by the petitioner. Her written decision (attached as Exhibit No. Three) indicates that all of the information was reviewed and that the Commissioner considered all of the criteria required. It cannot be said that any of her analysis of the evidence is unreasonable. When the petitioner provided further information, it was again reviewed by the medical director who wrote a written response to the new information. The Commissioner determined based upon his recommendation to rely on her prior decision to deny. Again, the Department amply demonstrated that it had considered all of the information supplied by the petitioner and had made its decision based upon the criteria in the regulation.

The petitioner disagrees with the Commissioner's finding that the use of acupuncture and massage therapy in the treatment of pain are not proven effective treatments. While there is evidence that acupuncture might be effective in some circumstances, there is also evidence that it is still in an investigational stage as set forth in the NIH Consensus. The petitioner has not shown that it is unreasonable for the Department to be guided by this government health statement from a panel of experts in its conclusion that efficacy has not yet been proven.

In addition, the petitioner has offered only anecdotal evidence that massage therapy has medical benefits for her condition. Some of the health information which she herself provided indicates that massage therapy has a low efficacy for her condition. Again, the petitioner has not shown that it was unreasonable for the Department to determine that this bodily manipulation has no proven medical efficacy for fibromyalgia.

The petitioner also disagrees with the Department's finding that she will not suffer serious detrimental health consequences if the service is not provided. She bases this on her own anecdotal experience with acupuncture and massage therapy. However, the medical director has put forth evidence

that the petitioner is not suffering from a life-threatening condition and even the petitioner's own nurse practitioner agreed that she would not be seriously harmed without this therapy (although she feels it would make her more comfortable). Again, it cannot be found that the Department's decision is unreasonable.

This is a difficult case because the petitioner suffers from chronic pain and honestly believes that these therapies have helped her to get relief. It may well be that these therapies have been the cause of her relief and that they are much cheaper than conventional therapies. However, it cannot be said that the Department's desire not to pay for these therapies because they have not been adequately proven in trials and because the practitioners are not working with or under the supervision of physicians is unreasonable. Therefore, even if the Board might reach a different conclusion under the evidence, the discretionary decision of the Commissioner must be upheld.

The petitioner was advised by the Board that there is no blanket prohibition against coverage of massage therapy under the Department's regulations provided such therapy is provided by a physical therapist and the petitioner can provide persuasive evidence that she obtain a medical benefit from

such therapy. If she can obtain such evidence of efficacy she is encouraged to reapply for that benefit under M108.

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